

ISSUED: February 27, 2004

D.T.E. 03-60 Track B

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers

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INTERLOCUTORY ORDER ON MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. TO COMPEL INFORMATION REQUEST RESPONSES BY VERIZON NEW ENGLAND, INC. D/B/A VERIZON MASSACHUSETTS

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INTERLOCUTORY ORDER ON MOTION OF AT&T COMMUNICATIONS OF NEW  
ENGLAND, INC. TO COMPEL INFORMATION REQUEST RESPONSES BY VERIZON  
NEW ENGLAND, INC. D/B/A VERIZON MASSACHUSETTS

I. INTRODUCTION

This case arises out of the Federal Communications Commission's ("FCC") Triennial Review Order,<sup>1</sup> in which the FCC found on a national basis that the combined effect of all aspects of the current line-by-line hot cut process<sup>2</sup> impairs the ability of competitive local exchange carriers ("CLEC") to serve the mass market. Triennial Review Order at ¶ 475. The FCC required state commissions to approve new batch cut processes or alternatively make findings to explain why such a process is unnecessary. Id. at ¶ 488. In this proceeding, the Department of Telecommunications and Energy ("Department") is investigating Verizon New England, Inc.'s d/b/a Verizon Massachusetts ("Verizon") Wholesale Provisioning Tracking System ("WPTS"), an additional batch cut process, and a large job process.<sup>3</sup>

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<sup>1</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order").

<sup>2</sup> A hot cut is "a process requiring incumbent LEC technicians to disconnect manually the customer's loop, which was hardwired to the incumbent LEC switch, and physically re-wire it to the competitive LEC switch, while simultaneously reassigning (*i.e.*, porting) the customer's original telephone number from the incumbent LEC switch to the competitive LEC switch." Triennial Review Order at ¶ 420 n.1294.

<sup>3</sup> In a separate track in this docket unrelated to the instant motion, the Department is also investigating impairment for loops, transport, and local circuit switching.

On January 22, 2004, AT&T Communications of New England, Inc. (“AT&T”) filed a motion to compel Verizon to respond to the following information requests: ATT-VZ-1-2, ATT-VZ-1-5, ATT-VZ-1-24, ATT-VZ-1-25, ATT-VZ-1-26, ATT-VZ-1-27, ATT-VZ-1-28, ATT-VZ-1-31, ATT-VZ-2-50, ATT-VZ-2-58, ATT-VZ-3-131, ATT-VZ-3-132, and ATT-VZ-3-133. The Department directed the parties first to confer in good faith to attempt to reduce the disputed issues prior to Verizon filing an opposition. The parties resolved their dispute over ten of the requests. On February 4, 2004, Verizon filed its opposition to AT&T’s motion to compel responses to ATT-VZ-3-131, ATT-VZ-3-132, and ATT-VZ-3-133. AT&T filed a response to Verizon’s opposition on February 12, 2004.

The information that AT&T seeks pertains to the labor rate inputs to be used to calculate forward-looking rates<sup>4</sup> for Verizon’s hot cut processes under the non-recurring cost (“NRC”) model. This issue raises the possibility of relitigating the propriety of the NRC Model, its inputs and underlying assumptions, and the NRC costs derived from the Model, which we recently approved in UNE Rates, D.T.E. 01-20 Part A (July 11, 2002). See also D.T.E. 01-20-Part A-B, at 35-36, 63, Order on Verizon Massachusetts’ Compliance Filing (May 29, 2003) (directing Verizon to file its next TELRIC case on March 1, 2006). In order to rule on whether AT&T’s motion to compel seeks information relevant to this proceeding, we must also rule on whether the labor rates that Verizon submitted as part of its NRC Model in this case are appropriate.

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<sup>4</sup> These rates are determined according to the total element long-run incremental cost (“TELRIC”) of providing the unbundled network element (“UNE”). 47 U.S.C. § 251; 47 C.F.R. § 51.505.



## II. STANDARD OF REVIEW

With respect to discovery, the Department's regulations provide:

The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1). The Department has discretion in establishing discovery procedures and is guided in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)(2). Mass.

R. Civ. P. 26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A party moving to compel responses to discovery requests must file such a motion no later than seven days after the passing of the deadline for responding to the requests.

220 C.M.R. § 1.06(6)(c)(4).

## III. POSITIONS OF THE PARTIES

### A. AT&T

AT&T seeks to compel a response to ATT-VZ-3-131 on the grounds that Verizon's pension plan actuarial assumptions and a comparison of Verizon's pension credits and costs are

relevant to the reasonableness of Verizon's proposed hot cut costs (AT&T Motion at 15-16).<sup>5</sup>

AT&T proposes to use this data to recalculate Verizon's hot cut labor costs consistent with TELRIC principles (id. at 16). AT&T contends that Verizon's benefit data recognizes all of Verizon's embedded costs, but "does not recognize all – or any – of Verizon's cost offsets" (id.). AT&T contends that the information requested will provide a more accurate picture of the net cost of Verizon's employee benefits (id.). AT&T maintains that Verizon's claim that pension fund performance does not affect its pension costs ignores the fact that Verizon must fund its pension plan, and that the cost of funding is a function of investment performance of the assets in the plan (AT&T Response at 2). AT&T also urges the Department to reject Verizon's argument that pension plan performance should not be considered, because the Department did not make an express finding on this specific issue in the UNE Rates proceeding in D.T.E. 01-20 (id. at 2).

AT&T also seeks to compel responses to information requests ATT-VZ-3-132<sup>6</sup> and ATT-VZ-3-133<sup>7</sup> on the grounds that the information sought is relevant to reasonableness of the

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<sup>5</sup> Information request ATT-VZ-3-131 reads: "For each year between 2002-2004, please provide Verizon's pension plan actuarial assumptions (actual gains and expectations). For each year, please compare the pension credits with the pension costs and identify the experienced or anticipated net gain or net loss on Verizon's pension funding."

<sup>6</sup> Information request ATT-VZ-3-132 reads: "If Verizon has purchased or contracted with any other organization to analyse how Verizon's wages, salaries, and/or benefits compare to those of other companies, please provide the entirety of those studies as well as any correspondence with the organization."

<sup>7</sup> Information request ATT-VZ-3-133 reads: "Please provide any studies, correspondence, or other information possessed by Verizon that compare Verizon's wages, salaries, and/or benefits to other companies' wages, salaries, and/or benefits."

cost models that Verizon proposed in its Initial and Supplemental Panel Testimony (AT&T Motion at 17). AT&T argues that the reasonableness of Verizon's labor rates is central to the determination of the TELRIC rate for an NRC, because those charges are comprised almost entirely of labor costs (AT&T Response at 3-4). AT&T argues that in determining TELRIC costs for hot cut processes, the Department should not accept costs as reasonable simply because Verizon incurs them, but must consider reasonableness from the perspective of a new entrant that is unencumbered by previously negotiated contracts (id. at 5).

Finally, AT&T argues that Verizon's objection that the three requests are unduly burdensome lacks merit, because Verizon produced responses to nearly identical requests in a New York hot cuts proceeding, N.Y.P.S.C. 02-C-1425 (AT&T Motion at 16-17). AT&T also asserts that an administrative law judge in that case found that a comparison of Verizon's wages, salaries, and benefits to other companies' labor costs bears greatly on the reasonableness of Verizon's costs and ordered Verizon to produce responses to questions similar to ATT-VZ-3-132 and ATT-VZ-3-133 (AT&T Response at 5).

B. Verizon

Verizon argues that the pension plan actuarial assumptions and actual net gain or loss on the pension plan, sought in information request ATT-VZ-3-131, are not relevant to the labor cost factors in Verizon's hot cut studies (Verizon Opposition at 1-2). Verizon states that "the investment performance of the pension plan in a given year neither increases nor reduces the cost Verizon incurs in that year in the form of increased pension obligations" (id. at 2). Verizon argues that because the net performance of the pension plan does not affect the

pension cost that Verizon incurs, it has no bearing on the hot cut cost study and would not provide a reason to recalculate the labor costs in the study (id.).

Verizon argues that the comparisons of Verizon's wages, salaries, and benefits sought in information requests ATT-VZ-3-132 and ATT-VZ-3-133, are not relevant, because the reasonableness of those expenses is not at issue in this proceeding (id. at 3). Verizon states that the labor rates in the hot cut cost study were developed in the same manner as those used in UNE Rates, D.T.E. 01-20 (id.; see also D.T.E. 01-20, Exh. VZ-37, Part I, Books 4-5 (revised June 12, 2003) (non-recurring cost model)). Verizon argues that no party questioned the reasonableness of Verizon's wages and employee benefits in that docket or any earlier TELRIC case in Massachusetts (Verizon Opposition at 3).<sup>8</sup> Verizon urges the Department not to turn this proceeding into a review of Verizon's managerial decisions on how to compensate its employees (id. at 4).

#### IV. ANALYSIS AND FINDINGS

The NRC Model in this proceeding is the same model that the Department approved in UNE Rates, D.T.E. 01-20 Part A, Letter Order on Verizon Massachusetts' Revised Compliance Filing (July 14, 2003). Compare D.T.E. 03-60 Track B, Verizon Initial Panel Testimony at 45, Exh. III-A (Nov. 14, 2003) with D.T.E. 01-20, Exh. VZ-37, Part I, Books 4-5 (revised June 12, 2003). However, Verizon updated the labor rate inputs to the model in this case by taking 2002 as the base year for labor rates and trending that rate to the

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<sup>8</sup> Verizon similarly argues that no party argued in D.T.E. 01-20 that the loading factor that Verizon used to account for its pension plan obligations should be adjusted based on the performance of its pension plan investments (Verizon Opposition at 2-3).

middle of 2005 (See Verizon Initial Panel Testimony at 58). We find that this is inconsistent with the Department's approval of the NRC Model in D.T.E. 01-20, in which we approved the model's assumption that the labor rate inputs would be determined by taking 1999 as the base year and trending the rate through 2002. D.T.E. 01-20 Part A, at 435 (July 11, 2002). We note that we had directed Verizon to revise its February 27, 2003 compliance filing in D.T.E. 01-20 for this very same reason. D.T.E. 01-20 Part A-B, at 35-36 (May 29, 2003). Therefore, we again direct Verizon to refile its NRC Model and supporting testimony with labor rates trended from 1999 as the base year through 2002, recalculating its proposed hot cut rates according to those labor rates. This filing is due within three days of the issuance of this Interlocutory Order.

Although we did not evaluate the overall TELRIC rates for the large job, batch, and WPTS processes in D.T.E. 01-20, the underlying labor rate inputs were already approved and will not be revisited until Verizon's next TELRIC proceeding in March 2006. See D.T.E. 01-20-Part A-B, at 35-36, 63 (May 29, 2003). Verizon and AT&T had a full and fair opportunity to litigate the labor rate inputs in D.T.E. 01-20. Those rates were essential to determining the NRC charges in that proceeding, because, as AT&T now argues in this proceeding, "non-recurring charges are inherently comprised almost entirely of labor costs" (AT&T Response at 3-4). The labor rate inputs under the NRC model in D.T.E. 01-20 are the same labor rate inputs in this proceeding, and there is no reason to apply different labor rate inputs to the new hot cut processes. Neither party has demonstrated good cause for relitigating the issue of labor rates.

The information that AT&T seeks to discover, therefore, is not relevant to the matters being reviewed in this proceeding. The information sought is not relevant to the activities and the adjusted work times necessary to the proposed hot cut processes, nor is it reasonably calculated to lead to admissible evidence on those matters. AT&T's motion to compel discovery responses to AT&T-VZ-3-131, ATT-VZ-3-132, and ATT-VZ-3-133 must be denied.

IV. ORDER

After due consideration, it is

ORDERED that Verizon shall refile its NRC Model and supporting documents, incorporating the modifications directed herein, within three days of this Order; and it is

FURTHER ORDERED that the motion of AT&T to compel responses to information requests ATT-VZ-3-131, ATT-VZ-3-132, and ATT-VZ-3-133 is DENIED.

By Order of the Department,

/s/  
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/s/  
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/s/  
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/s/  
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